IN THE

Supreme Court of the United States

October Term, A. D. 1942

No. .....

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, a corporation,

Petitioner,

vs.

AMELIA MULDOWNEY, as Special Administratrix of the Estate of HARRY MULDOWNEY, Deceased,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of Court Below.

The opinion of the Circuit Court of Appeals for the Eighth Circuit, "Chicago, St. Paul, Minneapolis & Omaha

Railway Company, Appellant, v. Amelia Muldowney, as Special Administratrix of the Estate of Harry Muldowney, Deceased, Appellee," was filed and judgment of affirmance entered October 26, 1942, and appear at Pages 242 to 254, inclusive of the record, and is reported in Volume 130 Federal (2d) on Page 971. Petition for rehearing (pp. 255-264) was denied November 14, 1942 (p. 265).

II.

Jurisdiction.

The basis upon which it is contended that this court has jurisdiction to review the decision and judgment of the Circuit Court of Appeals for the Eighth Circuit is fully stated under the heading "Jurisdiction" in the petition printed within this cover.

III.

Statement of the Case.

So far as pertinent to the questions presented for review, a statement of the case has been given under the heading "Summary Statement of Matter Involved" in the petition printed within this cover.

IV.

Specification of Errors.

(1) The Circuit Court of Appeals erred in holding that there was substantial evidence of negligence.

(2) The Circuit Court of Appeals erred in holding that there was substantial evidence of proximate cause.

V.

SUMMARY OF ARGUMENT.

No Substantial Evidence of Negligence or Proximate Cause.

(a) Test of liability under Federal Employers' Liability Act.

Safety Appliance Act, (27 Stat. 531, 45 U. S. C. A. Sec. 2),

Federal Employers' Liability Act, (35 Stat. 65, 66; 36 Stat. 291; 53 Stat. 1404; 45 U. S. C. A. 51-59),

Chicago, R. I. & Pac. Ry. v. Brown, 229 U. S. 317,

San Antonio Ry. v. Wagner, 241 U. S. 476,

Atlantic City R. R. Co. v. Parker, 242 U. S. 56,

Hampton v. Des Moines & Cent. I. R. Co., 65 Fed. (2d) 899 (C. C. A. 8),

Chicago, M. & St. P. Ry. Co. v. Coogan, 271 U. S. 472,

Toledo, St. L. & W. R. Co. v. Allen, 276 U. S. 165, 168, 169,

Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333, 339-344,

United States v. Ross, 92 U. S. 281, 283, 284,

Manning v. Insurance Co., 100 U. S. 693, 697, 698,

Patton v. Texas & Pacific Ry. Co., 179 U. S. 658, 663, 664,

Gunning v. Cooley, 281 U. S. 90, 94, 95,

Ewing v. Goode, 78 Fed. 442, 444.

(b) No substantial evidence of violation of Safety Appliance Act.

Meisenhelder v. Byram, 182 Minn. 615, 617, 233 N. W. 849, 850,

United States v. Hill, 62 Fed. (2d) 1022, 1025, 1026, (C. C. A. 8).

(c) No substantial evidence of proximate cause. Evidence leaves cause of death in realm of speculation and conjecture.

Looney v. Metropolitan Railroad Co., 200 U. S. 480,

Miller v. Union Pac. R. Co., 290 U. S. 227,

Great Northern Ry. Co. v. Wiles, 240 U. S. 444,

Patton v. Texas & Pacific Ry. Co., 179 U. S. 658,

Chicago, M. & St. P. Ry. Co. v. Coogan, 271 U. S. 472,

Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333,

Lowden v. Burke, 129 Fed. (2d) 767 (C. C. A. 8),

Geraghty v. Lehigh Valley R. Co., 70 Fed. (2d) 300, 83 Fed. (2d) 738, (C. C. A. 2),

Williamson v. St. Louis-San Francisco Ry. Co., 74 S. W. (2d) 583 (Mo.),

Atlantic Coast R. Co. v. Wimberley, 273 U. S. 673,

Gulf M. & N. R. Co. v. Wells, 275 U. S. 455,

Ft. Smith S. & R. I. R. Co. v. Moore, 276 U. S. 593,

Louisville & N. R. Co. v. Chatters, 279 U. S. 320, 332,

Northern Ry. Co. v. Page, 274 U. S. 65, 72,

Atchison, T. & S. F. Ry. Co. v. Toops, 281 U. S. 351, 354, 355,

Southern Ry. Co. v. Moore, 284 U. S. 581,

Atchison, T. & S. F. Ry. v. Saxon, 284 U. S. 458,

Southern Ry. Co. v. Walters, 284 U. S. 190, 194,

New York Cent. R. Co. v. Ambrose, 280 U. S. 486, 489, 490,

Northwestern Pac. R. Co. v. Bobo, 290 U. S. 499, 502, 503.

VI.

ARGUMENT.

No Substantial Evidence of Negligence or Proximate Cause.

(a) *Test of Liability under the Federal Employers' Liability Act.*

The sole claim of negligence is a violation of the Safety Appliance Act relating to automatic couplers. The Act prohibits the use of "any car * * * not equipped with couplers coupling automatically by impact * * * without the necessity of men going between the ends of cars." (27 Stat. 531, 45 U. S. C. A. Sec. 2.) Here there is no claim of a defective condition of the coupling apparatus. Specifically the claim is that the refrigerator car drawbar was not in line with the tender drawbar, necessitating Muldowney's presence between the car and tender to shift the car drawbar east to effect alignment before automatic coupling could be made.

When drawbars are sufficiently out of alignment so that, with one or both coupler knuckles open, the couplers will not couple automatically on impact, that is evidence justifying a jury finding that the couplers do not meet the requirements of the Safety Appliance Act. Under such circumstances, an employe injured, while necessarily between the cars to align the drawbars to effect automatic coupling, may recover as for a violation of the Act.

Chicago, R. I. & Pac. Ry. v. Brown, 229 U. S. 317,
San Antonio Ry. v. Wagner, 241 U. S. 476,
Atlantic City R. R. Co. v. Parker, 242 U. S. 56,
Hampton v. Des Moines & Cent. I. R. Co., 65 Fed. (2d) 899 (C. C. A. 8).

Violation of the Safety Appliance Act is one species of carrier negligence under the Federal Employers' Liability Act. Negligence and proximate cause must be established beyond speculation and conjecture by evidence which is substantial.

San Antonio Ry. v. Wagner, 241 U. S. 476, 484,
Chicago, M. & St. P. Ry. Co. v. Coogan, 271 U. S. 472,
Toledo, St. L. & W. R. Co. v. Allen, 276 U. S. 165, 168, 169,
Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333, 339-344.

Whenever circumstantial evidence is relied on to prove a fact the circumstances must be proved by direct evidence and not themselves presumed. A verdict based on inferences from inferences, presumptions resting on other presumptions or mere speculation and conjecture, cannot stand.

United States v. Ross, 92 U. S. 281, 283, 284,
Manning v. Insurance Co., 100 U. S. 693, 697, 698,
Chicago, M. & St. P. Ry. Co. v. Coogan, 271 U. S. 472, 477, 478,
Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333, 341-344.

Definitely and repeatedly the scintilla rule has been rejected by this court. Where the evidence is circumstantial

on an issue of negligence or proximate cause, and the inferences properly to be drawn from the proven facts or circumstances are more consistent or equally consistent with nonliability than with liability, the proof tends to establish neither, and judgment as a matter of law must go against the party upon whom rests the burden of proving liability.

Patton v. Texas & Pacific Ry. Co., 179 U. S. 658, 663, 664,

Chicago, M. & St. P. Ry. Co. v. Coogan, 271 U. S. 472, 477, 478,

Gunning v. Cooley, 281 U. S. 90, 94, 95,

Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333, 341-344,

Ewing v. Goode, 78 Fed. 442, 444.

There is no direct evidence that, had Muldowney's body not intervened, the coupling would not have made automatically on impact, without the necessity of a prior shifting of the car drawbar by Muldowney, nor is there direct evidence that in fact he was so engaged or that he went between the car and tender for that purpose. Absent such direct evidence, it was incumbent on respondent to establish those facts by proof of circumstances which would justify the necessary inferences.

Under the foregoing controlling legal principles, respondent failed to adduce substantial evidence to justify a jury finding that petitioner violated the Safety Appliance Act, or that a violation of such Act proximately caused Muldowney's death. Consequently, the holding of the Circuit Court of Appeals is contrary to and in direct conflict with the cited decisions of this court and should be reversed.

(b) *No substantial evidence of violation of Safety Appliance Act.*

If there was a violation of the Safety Appliance Act, it did not result from a mechanical defect in the couplers, but arose, if at all, because the alignment of the drawbars did not permit automatic coupling on impact, unless a man went between the car and tender to shift the car drawbar. Under this theory what is the proof of violation of the Act?

There is no direct evidence that prior to the accident, the alignment of the drawbars would not permit automatic coupling on impact. Was there direct evidence of circumstances from which this fact could be inferred?

Both coupler knuckles were found closed after the accident. There is no direct evidence that one or both coupler knuckles were open before the accident. The circumstance that both knuckles were found closed after the accident, does not justify an inference that one or both were open at any prior time. The only proven circumstance which might justify an inference in this respect is the fact that, when the moving tender was eight to twelve feet from the car, Muldowney signaled the engineer to continue back to make the coupling. The logical inference from this circumstance is that the drawbars and couplers were then in position to effect automatic coupling. If both knuckles were open, a coupling usually will make even though the drawbars are not in direct line with each other. If it be assumed that the draw-bar alignment observed by Muldowney, as he approached the car and gave the signal, was the same as that found after the accident, then the natural inference to be drawn is that both knuckles were open and

hence Muldowney concluded the coupling would make, as it ordinarily did make under those circumstances. If, because of the signal, it be assumed that only one knuckle was open, then the logical inference to be drawn is that the drawbars were in alignment. It is apparent that Muldowney would not have given the signal unless he concluded that the drawbars and coupler knuckles were in position to effect coupling; otherwise he would and could have given a stop signal, or given no signal and stepped off the footboard to the west to await the result of the impact.

If the signal, as a circumstance to indicate the foregoing, is rejected, then there is no evidence one way or the other, except the fact that the knuckles were found closed after the accident. If, without regard to the evidence, we adopt speculation, then it is as logical to assume that both knuckles were open as to conclude that one only was open.

Under any of these theories, there is no substantial evidence to indicate that prior to the accident the coupling would not have made had Muldowney's body not intervened. The evidence leaves this issue in the realm of speculation and conjecture. The inference that the coupling would have made is as consistent, or more consistent, with the proven circumstances than the inference that it would not have made.

The location of Muldowney's body between the closed coupler knuckles is not a circumstance that justifies an inference that a drawbar adjustment was necessary or that he was attempting to effect one when injured. To so infer assumes a violation of the Act, without evidence in support, and then adopts the unsupported assumption to prove the violation and explain Muldowney's presence between

the couplers. Such an inference also is inconsistent with the undisputed fact, that, had a drawbar adjustment been necessary, Muldowney without leaving the footboard, could have made it by shifting the easily moved tender drawbar. His presence between the couplers is much more consistent with his slipping after stepping off the footboard to await the result of the impact or some purpose unrelated to the car drawbar alignment.

Because, later, Foreman Schupp may have stood in front of the car coupler to shift the car drawbar, does not justify an inference that Muldowney did likewise, or that there was necessity for a shifting of the car drawbar before the accident. Prior to his first attempt to couple, under circumstances much more favorable than those existing when Muldowney approached the car on the moving tender, Schupp did not discover any misalignment. It is pure speculation to conclude that Muldowney discovered a drawbar misalignment. The fact that, with the car and tender stationary and separated by twenty feet, Schupp stood in front of the car coupler and shifted the drawbar to the east, certainly has no tendency to prove that Muldowney would take a similar position in a space of less than twelve feet and in the path of the tender moving on his own signal. Such an inference is in direct conflict with the proven circumstance that, had a drawbar adjustment been necessary as Muldowney approached the car, he could have made it in safety by shifting, in either direction, the oiled and easily moved tender drawbar without stepping off the footboard.

The failure to couple after the accident, with only the car coupler knuckle open and the tender drawbar off center to the east, followed the impact between the 90 ton switch engine and tender, moving 2 to 3 miles per hour, and the

stationary 13½ ton car, with Muldowney's body between the closed coupler knuckles. As aptly stated by the Supreme Court of Minnesota in *Meisenhelder v. Byram,* 182 Minn. 615, 617, 233 N. W. 849, 850:

> "There is testimony of one witness that after the accident the cars did not automatically couple on the first attempt, a not unusual occurrence. *But at that time the coupler knuckles had suffered the impact in which the decedent's body was injured, and the reasonable inference is that one or both of the knuckles * * * had moved"* (Italics supplied).

To negative the natural inference, that the force of the impact would be likely to move drawbars, one of which was lubricated, that one man could shift by hand, respondent offered the opinion testimony of the witness Welton (ff. 108-113, pp. 80-83). He expressed the opinion that, if the drawbars were in line prior to the accident, the presence of Muldowney's body between the couplers would not cause the drawbars to be out of line after the accident. Why the tender drawbar was off center to the east after the accident is not explained.

That this opinion testimony was incompetent as proof of the fact of misalignment and contrary to natural laws and common sense, will be indicated by a consideration of the facts assumed and those ignored in the hypothetical question propounded. The question made no assumption respecting (1) whether the coupler knuckles were open or closed; (2) the position and posture of Muldowney and if, when struck by the tender coupler, he was struggling to escape injury; (3) the fact that his body was located to the east of the center of the car coupler; (4) the fact that the

tender coupler was off center to the east; (5) the weight of the car and of the moving tender. In addition the hypothetical question, contrary to the undisputed evidence that it was centered after the accident, assumed that the car drawbar was to the east of center.

These omitted and improperly included facts would have a direct bearing on the likelihood of the impact causing the drawbars to shift. The jury could not speculate and find that the opinion would have been the same if these material factors had been considered.

Where, as here, it clearly appears that the expert opinion, so-called, is pure speculation, and is opposed to physical laws, common knowledge and common sense, it will not be accepted as substantial evidence. *United States v. Hill,* 62 Fed. (2d) 1022, 1025, 1026 (C. C. A. 8).

(c) *No substantial evidence of proximate cause. Evidence leaves cause of death in realm of speculation and conjecture.*

Implicit in the verdict is a finding that, when crushed between the couplers, Muldowney was in the act of lifting the 350 pound car coupler drawbar east to align it with the off center tender drawbar. There is no direct evidence to sustain this finding, and, unless the circumstances proved by direct evidence justify inferences to that effect, there is no support in the evidence for the finding.

The following circumstances were established by direct evidence:

(1) That both coupler knuckles were found closed after the accident (f. 26, p. 19). There is no evidence that either was open prior to the accident.

(2) That when the moving tender was 8 to 12 feet from the refrigerator car Muldowney, from the tender footboard, signaled the engineer to continue back to make the coupling (ff. 132-137, pp. 96-100).

(3) That if drawbar alignment was necessary it could be, and customarily was made by shifting the easily moved tender drawbar without leaving the tender footboard (f. 246, p. 180; ff. 253, 254, p. 186).

(4) That with both knuckles open a coupling usually will make even when the drawbars are not in alignment (ff. 224-226, pp. 165, 166).

(5) That after the accident, when the car and engine were stationary and separated twenty feet, Foreman Schupp did not discover any misalignment but opened the car coupler knuckle and made one attempt to couple before moving the car drawbar. That when the coupling did not make on the first attempt after the accident, Foreman Schupp separated the car and tender twenty feet and may have stood in front of the car coupler to move the car drawbar east (ff. 88-92; pp. 65-68).

Manifestly if both coupler knuckles were closed before the accident Muldowney would not attempt to line the drawbars. In that situation, even if the drawbars were in direct line, a coupling could not be made.

As Muldowney approached the car on the footboard of the moving tender the tender headlight shown on the car and he held his lighted lantern. He knew the engineer was governed by his signals. When the moving tender was eight to twelve feet from the car he signaled the engineer that everything was in readiness to make the coupling and to continue back for that purpose. The only permissible inference from this proven circumstance is, that, before Muldowney gave this signal, he concluded that the drawbars were in line and that the coupling would make.

Otherwise we must assume that he would have given a stop signal and not a signal which he, as an experienced switchman, knew would advise the engineer that everything was in readiness to make the coupling and that the tender should continue backing for that purpose.

Certainly it will not be contended that a jury could infer that after he gave this signal, Muldowney discovered he was mistaken in his appraisal of the situation, and, when the moving tender was eight, six or two feet from the car, would step in front of the car coupler to attempt the hazardous and impossible task of lifting or shoving the 350 pound car drawbar east. Mere statement of this hypothesis should be sufficient refutation.

As stated heretofore, it is as logical to assume that both knuckles were open as it is to assume that one only was open. If both were open there is no evidence from which the jury could infer that the coupling would not have made, even based on the assumption that the drawbar alignment before was identical with that found after the accident.

Under respondent's theory Muldowney discovered the misalignment after he signaled the engineer and at a point ten, five or two feet from the car. He is presumed to have exercised due care for his own safety and not to have had a suicidal intent. Absent direct evidence respecting Muldowney's conduct, it is presumed that he did not act negligently (*Looney v. Metropolitan Railroad Co.*, 200 U. S. 480; *Miller v. Union Pac. R. Co.*, 290 U. S. 227). In fact, under the instructions of the trial court, to return a verdict for respondent, the jury was required to find that Muldowney exercised due care for his own safety (f. 282, p. 206).

In view of this presumption and the proven circumstances, what are the natural inferences respecting Muldowney's conduct if he did discover a misalignment after giving the last signal? Three safe ways of effecting alignment were available to him. He could have given a stop signal, separated the car and tender twenty feet, and shifted either drawbar. By a simple manipulation of the tender drawbar, in accordance with the customary practice, he could have aligned the drawbars, irrespective of the position of the car drawbar, without leaving the footboard. He could have stepped off the footboard to the west, awaited the result of the impact and, if the coupling did not make, separate the car and tank and, while they were stationary, make any adjustment found necessary, which was the method adopted by Schupp. Notwithstanding these logical and consistent inferences respecting normal conduct and due care, the jury, without supporting evidence, found that Muldowney, in utter disregard of its feasibility and his own safety, placed himself at a point and in a position that could only result in instant death. It is submitted that this conclusion could only be reached by speculating as to the cause of death.

Muldowney's presence between the couplers is much more consistent with an attempt to cross to the yard office and misjudgment as to the hazard, or slipping after stepping from the footboard for a purpose not connected with drawbar alignment. Such explanation of the cause of death is more consistent with the proven circumstances and does not convict him of gross negligence nor conflict with the finding implicit in the verdict that he exercised due care for his own safety.

If he went between the car and tender to open the car coupler knuckle by hand or for some purpose other than to shift the car drawbar, his death was due to his own act and there would be no company liability (*Great Northern Ry. v. Wiles,* 240 U. S. 444).

If the drawbar alignment before was the same as after the accident, then before the accident the car drawbar was centered and the tender drawbar was off center to the east. In that situation, the natural inference is that Muldowney, to effect alignment, would pull the easily moved tender drawbar west to place it in line with the centered car drawbar, rather than attempt the hazardous and impossible task of moving the car drawbar east.

The evidence leaves the cause of death in the realm of speculation and conjecture. Viewed in a light most favorable to respondent, the inferences from the proven facts and circumstances are more consistent with nonliability. Only by a disregard of the circumstances established by direct evidence, and drawing inferences from inferences and basing presumption on presumption, can a conclusion of liability be reached.

The action of the Circuit Court of Appeals in affirming a judgment based on a verdict so arrived at conflicts with the applicable and controlling decisions of this court.

Patton v. Texas & Pacific Ry. Co., 179 U. S. 658,
Chicago, M. & St. P. Ry. Co. v. Coogan, 271 U. S. 472,
Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333.

In its opinion the Circuit Court of Appeals ignored and failed to mention the controlling decisions of this court. In support of its holding that the proven circumstances justified the inferences drawn by the jury, that Court re-

lied on *Lowden v. Burke,* 129 Fed. (2d) 767, (C. C. A. 8); *Geraghty v. Lehigh Valley R. Co.,* 70 Fed. (2d) 300, 83 Fed. (2d) 738, (C. C. A. 2), and *Williamson v. St. Louis-San Francisco Ry. Co.,* 74 S. W. (2d) 583, (Mo.), and stated that "the contention that the violation of the Safety Appliance Act was not the proximate cause of Muldowney's death need only be given passing notice" (p. 252, top) and then in passing fails to notice it at all. To the extent that the decisions cited by the Circuit Court of Appeals in its opinion conflict with the Patton, Coogan and Chamberlain decisions, they are not controlling. The doctrine of the Patton, Coogan and Chamberlain decisions has been followed and applied in many subsequent decisions of this court.

Atlantic Coast R. Co. v. Wimberley, 273 U. S. 673,
Gulf M. & N. R. Co. v. Wells, 275 U. S. 455,
Ft. Smith S. & R. I. R. Co. v. Moore, 276 U. S. 593,
Louisville & N. R. Co. v. Chatters, 279 U. S. 320, 332,
Northern Ry. Co. v. Page, 274 U. S. 65, 72,
Atchison, T. & S. F. Ry. Co. v. Toops, 281 U. S. 351, 354, 355,
Southern Ry. Co. v. Moore, 284 U. S. 581,
Atchison, T. & S. F. Ry. v. Saxon, 284 U. S. 458,
Southern Ry. Co. v. Walters, 284 U. S. 190, 194,
New York Cent. R. Co. v. Ambrose, 280 U. S. 486, 489, 490,
Northwestern Pac. R. Co. v. Bobo, 290 U. S. 499, 502, 503.

The Coogan decision involved an action under and a construction of the Federal Employers' Liability Act and definitely lays down the rule that where circumstantial

evidence is relied on to establish liability, (a) the circumstances themselves must be proved by *direct* evidence; (b) inferences can be drawn only from circumstances established by *direct* evidence; (c) inferences on inferences and presumptions on presumptions are not substantial evidence and (d) that a verdict based on speculation and conjecture cannot stand.

Verdicts based on sympathy, rather than substantial evidence, were criticized by this court in *Patton v. Texas & Pacific Ry. Co.*, 179 U. S. 658, 664:

> "If the employe is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

In the case at bar it is apparent that the holding of the Circuit Court of Appeals departs from the settled rules of proof laid down by this court and should be reversed.

CONCLUSION.

It is respectfully submitted that, in view of the failure of the Circuit Court of Appeals to follow the doctrine of the Patton, Chamberlain and Coogan decisions, this case is one calling for the exercise by this court of its supervisory powers in order that justice may be done in this case and the conflict between the decision of the Circuit Court of Appeals for the Eighth Circuit and the applicable and controlling decisions of this court may be removed; and to such end a writ of certiorari should be granted and

this court should review the decision of the Circuit Court of Appeals for the Eighth Circuit and finally reverse it.

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